No. 85-495

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ANSONIA FEDERATION OF TEACHERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a public school teacher established a prima facie case of religious discrimination under Title VII, where he was provided three days of leave with pay for religious observance and additional days of leave without pay for religious observance?

2. Did the Court of Appeals err, after determining that the employer's accommodation of the employee's religious observance practices was reasonable accommodation, in inquiring whether there were other reasonable accommodations of the employee's religious beliefs which would not create an undue hardship for the employer?

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STATEMENT OF THE CASE

Respondent, Ronald Philbrook, has been employed by petitioner, Ansonia Board of Education, as a teacher since 1962. In 1968, Philbrook became a member of the Worldwide Church of God, the tenents of which require that members refrain from servile work on designated holy days as a condition or receiving eternal life. As a member of the Worldwide Church of God, Philbrook has been required to refrain from secular employment on up to six days occurring during the school year. Since 1967-68 school year, collective bargaining agreements between the board of education and the Ansonia Federation of Teachers, the union representing members of the Ansonia teachers'

bargaining unit, have entitled Philbrook to three days of paid annual leave to observe religious holidays. Philbrook and other teachers in Ansonia are provided eighteen additional days of paid leave cumulative to 180 days for illness and other enumerated purposes including three days of leave to attend to "necessary personal business". These three days of paid leave, under the terms of the governing collective bargaining agreements, may not be used for those reasons for which paid leave is otherwise provided.

In order to accommodate Philbrook's need to refrain from work on more than three days, the board of education has allowed him to be absent without pay beyond the three days of

paid leave guaranteed under the collective bargaining agreements. From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement taking three days of paid leave in each school year. It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holidays.

REASONS FOR GRANTING THE WRIT

THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE REQUIREMENTS FOR A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII, AND WITH RESPECT TO THE INTERPRETATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED 42 U.S.C. SECTION 2000e-2(A) AND SECTION 2000e(J).

The decision of the Second Circuit below conflicts directly with the Tenth Circuit decision in Pinsker v. Joint District number 28J, 735 F. 2d 388(10th Cir. 1984).

The Respondent-Plaintiff in opposition to this Petition attempted to distinguish the cases on the basis of the use of two days of personal

leave for religious observance in Pinsker, supra as opposed to the use of three days of leave for religious observance in Philbrook v. Ansonia, 757 F. 2d 476 (2d Cir. 1985)

The distinction is meaningless as it affects the critical issues of a Title VII "prima facie" case of religious discrimination and the construction of the reasonable accommodation provisions of Title VII.

In both Pinsker and Philbrook the Complainants, both public school teachers were given unpaid leave after exhaustion of respectively two and three days of paid leave for religious observance.

The Tenth Circuit specifically found at 735 F. 2d 391 that Pinsker had failed to make a prima facie showing of

discrimination. The Second Circuit found on nearly identical legal operative facts that Philbrook had made a prima facie case of religious discrimination under Title VII (see Petition Appendix page 14a).

The conflict is further apparent in the Circuit's construction of the "reasonable accommodation" requirement under Title VII. The Tenth Circuit specifically found in Pinsker, supra that a leave policy providing two days of paid leave for religious observance and additional days of unpaid leave constituted a reasonable accommodation. The Second Circuit in Philbrook (Appendix to Petition 14a) concluded:

> "We presume that Ansonia's leave policy is also "reasonable."".

The Tenth Circuit construing the "reasonable accommodation" and "undue hardship" provisions of Title VII in the disjunctive held at 735 F. 2d 390:

> "Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer."

Citing a Sixth Circuit decision McDaniel v. Essex International, Inc., 571 F. 2d 338, 341 (1978). In construing Title VII in this fashion, the Court realized once a determination had been made that the employer had reasonably accommodated the employees' religious beliefs and practices, then it was not necessary to consider alternative accommodations and their "undue hardship" on the employer. The

issue of "undue hardship" should only be considered when the employer has been unable to reasonably accommodate the employee.

The construction of the "reasonable accommodation" and "undue hardship" provisions by the Second Circuit are articulated (Appendix page 14a) in its decision:

"We presume that Ansonia's leave policy is also "reasonable." And if Title VII's duty to accommodate were to be defined without reference to undue hardhip, we would hold that the school board has satisfied its burden. The duty to accommodate, however, cannot be defined

without reference to undue hardship.

In many circumstances, more than one accommodation could be called "reasonable." Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless the accommodation causes undue hardship on the employer's conduct of his business."

The Second Circuit's decision goes on to note (Appendix 15a) that their analysis has never been previously articulated, but allege consistent interpretation citing Brener v. Diagnostic Center Hospital, 671 F. 2d

141 (5th Cir. 1982). (Though cited by the Second Circuit as supporting its construction of Title VII, the decision in Brener involved a termination case for failing to report on a day of religious observance. The unquestioned prima facie case in Brener required the Court to discuss whether reasonable accommodation was possible.)

Consistant with its analysis, the Second Circuit went on to consider whether despite the employer's reasonable accommodation, the employee's proposal could be met without undue hardship on the employer. Despite this Court's clear articulation of "undue hardship" in Transworld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) the Second Circuit went on to find no undue hardship under

alternative accommodations proposed by the employee.

The Fifth Circuit decision in Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (1982) cited by the Second Circuit in its decision below; not only does not articulate the analysis of the Second Circuit, but suggests a third construction by a Circuit Court of Appeals of the "reasonable accommodation" language of Title VII.

In Brener the Fifth Circuit held at 671 F. 2nd 146:

> "Although the statutory burden to accommodate rests with the employer, the employee has a corr lative duty to make a good faith attempt to satisfy his needs through means offered by

the employer. A reasonable accommodation need not be on the employees' terms only."

The Court having concluded that Brener had established a prima facie case (he was terminated for refusing to show up for work on a religious holiday), considered whether the employer had "reasonably accommodated" his religious practices. In determining whether the employer had attempted to reasonably accommodate Mr. Brener the Fifth Circuit considered the employee's proposed solutions; and found that they would have a detrimental impact on the the employer's business.

It is not apparent from such decision that the Fifth Circuit would have on the facts of the instant case (the only discipline alleged is the

unpaid leave for the days not worked) gone beyond a finding of reasonable accommodation.

It may very well be that the current state of the law amongst the Circuit Courts of Appeals involves three approaches to the "reasonable accommodation" and "undue hardship" provisions of Title VII. The Tenth Circuit approach involves an initial determination of whether the employer has reasonably accommodated the employees' religious beliefs and practices. If the employer has reasonably accommodated such interests, the analysis goes no further. If the employer has been unable to reasonably accommodate the religious practices, the issue then becomes whether the proposed accommodations would impose

undue hardship on the employer's business. The Second Circuit in its decision below, requires an employer, whether or not they have reasonably accommodated the employees' religious practices; to determine whether any of the employees' proposed accommodations would impose an undue hardship on the employer's business. The Fifth Circuit in Brener v. Diagnostic Center Hospital, supra, suggests that undue hardship is the measure of whether the employer has reasonably accommodated its employees' religious practices. The Fifth Circuit contrary to the Second Circuit, finds a "correlative duty" of the employee to make a good faith attempt to satisfy his needs through a means offered by the employer.

The Tenth Circuit and Fifth Circuit decisions seem consistent with this Court's holding in Transworld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) wherein there was a discharge for refusal of the employee to report on a day in which he observed his religious practices. The District Court Decision ultimately upheld by this Court in Transworld Airlines, Inc., supra, involved a finding that the employer had attempted reasonable accommodations, and that further accommodations would have worked an undue hardship.

In view of the apparent conflict between the Circuits it is neccessary that this Court specifically address the issue of the application of the standards of "reasonable accommodation"

and "undue hardship" under Title VII.

THE COURT OF APPEALS DECISION CONSTRUES TITLE VII OF THE 1964 CIVIL RIGHTS ACT, AS AMENDED, IN A MANNER WHICH IS IN CONFLICT WITH THE FIRST AMENDMENT

This Court in its recent decision in Estate of Thornton v. Caldor, Inc. ——U.S.——, 105 S.Ct. 2914 (1985) reaffirms that a statute in order to pass constitutional muster under the establishment clause, must not only have secular purpose and not foster excessive entanglement of government with religion; but its primary effect must not advance religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). The Connecticut Statute which created an

absolute accommodation requirement with respect to "Sabbath" observance was found to have promoted or advanced religious practices.

In her concurring opinion Justice O'Connor (with whom Justice Marshall joined) noted at 105 S. Ct. 2919 in dicta that Title VII should stand constitutional muster under the establishment clause since it calls for a reasonable rather than absolute accomodation.

If the employer must not only reasonably accommodate the employee's religious practice; but go further and accept any proposal by the employee with respect to accommodation, unless the employer can establish that it would cause "undue hardship" to its business; the advancement of religion

is clearly at issue.

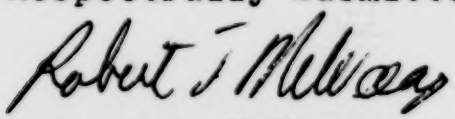
If the employer under Title VII is obligated to provide to employees additional benefits because of their religious practices (additional days leave, the right to work other than during the normal work week or work year) discrimination in the form of termination because of religious practices, or substantial interference with religious practices is not involved. What is at issue is a governmental requirement that facilitates religious practices and "advances" religion. This is clearly prohibited by the establishment clause.

The Court should grant the Writ in this case to insure that Title VII is construed and applied in a manner which is constitutionally permissible.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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